LIBRARY
SUPREME COURT, U. S.

FILED
AUG 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1260

LOUIS POMPONIO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY FOR PETITIONER

ALAN Y. COLE
ISAAC N. GRONER
LEE A. SCHUTZMAN
COLE AND GRONER, P.C.
1730 K Street, N.W.
Washington, D. C. 20006
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
I. The Government's Opposition Is Inconsistent With The Position Taken By The Government In The Nardello Case	2
II. The Legislative History Demonstrates That Bribery As Used In The Travel Act Is Restricted To The Corruption Of Public Officials	4
III. The Opposition Disregards The Clear, Well-Established Distinction Between Bribery and Commercial Bribery	5
IV. The Travel Act Cannot Be Used To Make 18 U.S.C. § 215 Extend To The Conduct Of The Payor	9
Conclusion	9

CITATIONS

CASES:

Razette v. United States, 199 F.2d 44 (6th Cir.), cert. denied, 344 U.S. 904 (1952)	7-8
United States v. Nardello, 393 U.S. 286 (1969) (*"Nardello"*)	2-4

STATUTES:

Mississippi Criminal Code:	
Section 97-11-11	6
Section 97-11-13	6
New York Penal Law:	
Section 180	6
Rhode Island General Laws Annotated:	
Section 11-7-3	6
Section 11-7-4	6

Page

UNITED STATES CODE:

Title 18:

Section 215 9

Section 1952 ("Travel Act") ..... *passim*

Title 22:

Section 1584 8

OTHER:

Clark and Marshall, Crimes (7th ed. 1967) 6-7

3 Wharton's Criminal Law and Procedure (Anderson ed. 1957) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1260

LOUIS POMPONIO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY FOR PETITIONER

The Brief for the United States in Opposition ("Opp.") is more a preliminary brief on the merits than a genuine attempt to respond to the Petition ("Pet.") or to deny that certiorari should be granted.

To the extent that it does not simply assert that the views it presents are the law, the Opposition exposes itself as an attempt to rewrite both history and the law.[1]

I.

THE GOVERNMENT'S OPPOSITION IS INCONSISTENT WITH THE POSITION TAKEN BY THE GOVERNMENT IN THE NARDELLO CASE.

The most revealing index to the quality of the Opposition is its attempt to conceal the irreconcilable inconsistency in the Government's own legal positions. What is now proffered in the Opposition is directly opposed to the reading of the Travel Act the Government presented to this Court in all the deliberateness and formality of a brief on the merits, in *United States* v. *Nardello,* 393 U.S. 286 (1969) (*"Nardello"*). What the Government represented to this Court in *Nardello* supports the Petition in this case; it cannot be harmonized with the Opposition.

---

[1] In addition, the Opposition finds it necessary or desirable to rewrite the record. It asserts, for example, that the Indictment charged that the travel in this case was "with the intent to make payments to the officer of a national banking association to influence him in the performance of his duties *without the consent of the bank*" (Opp. 5; emphasis is added throughout this Reply unless otherwise specified); in plain truth, however, the Indictment simply does not include the charge of "without the consent of the bank". Whether the Indictment is defective for this reason is subsumed within the Questions Presented in the Petition. It would appear that the Government has now recognized that such an allegation was legally required (Opp. 6).

Similarly unfounded is the statement that Zneimer helped Petitioners receive construction loans from the Royal National Bank totalling $16 million (Opp. 4). In plain truth, the $16 million is the amount of loans from other sources for which Petitioner contended that the $320,000 was paid. This was the amount of the secondary, not primary, financing.

In *Nardello,* the Government position, which this Court accepted, was that the term "bribery" in the Travel Act was directed and limited to the corruption of public officers—as the Petition herein sets out. It was upon the restriction of "bribery" to conduct by public officials that the Government based its contention that "extortion" (the term at issue in *Nardello*) must be interpreted as extending to blackmail by private individuals; the contention was that "extortion" would be rendered superfluous if it were to be restricted to corruption in the public sector, precisely because the Travel Act proscribed "bribery," an unlawful activity restricted to corrupt conduct by *public* officials.[2] In *Nardello* the Government recognized and the Court determined that the proper accommodation between the terms "bribery" and "extortion" in the Travel Act required assigning each to a separate sphere so that neither term would be rendered superflous. This very construction of the Travel Act would be vitiated if the Government position in this case were ultimately to prevail.

The Government meticulously eschews any response to this point in the Opposition and blandly takes the contrary position. It has the temerity to base its position upon an assertion that "the Act is not limited to bribery of public officials nor to bribery as defined at common law" (Opp. 8). The Government has thus

---

[2] This was fully discussed in the Petition, at pages 12-15; the Government's brief in *Nardello* is quoted at pages 12-13, n. 8 of the Petition, and the Court's references to the Government's position in *Nardello,* at pages 12-14, including the quotation from the decision setting out the Government's argument, 393 U.S. at 293, n. 11 (Pet. 12).

blinded itself to the blatant inconsistency of that assertion with its own prior representations to this Court.

II.

THE LEGISLATIVE HISTORY DEMONSTRATES THAT BRIBERY AS USED IN THE TRAVEL ACT IS RESTRICTED TO THE CORRUPTION OF PUBLIC OFFICIALS.

This Court's decision in *Nardello* relied upon the legislative history of the Travel Act, particularly the express declarations by both the Attorney General and the Deputy Attorney General that the Travel Act was directed to bribery of public officials (Pet. 13-14). The Government now asserts that this legislative history shows that "the *primary* impetus for this provision of the Travel Act may have been bribery of public officials" (Opp. 8). As demonstrated above, the Government's position in *Nardello* was that the entire reach of "bribery" as used in the Act was circumscribed by public official conduct. Either the Act was intended to be confined to the bribery of public officials, or it was not; either "bribery" in the Act does, or does not, reach private conduct. These questions demand an "either-or", "yes-or-no" answer.

In historical fact, the statute was directed to the corruption of public officials, not private individuals. The "bribery of public officials" was the impetus for this provision of the Travel Act (Pet. 14, n. 9). There was no legislative intention to extend the term beyond that parameter; the Opposition certainly does not even suggest there is any legislative history or other such support for its assertions.

III.

THE OPPOSITION DISREGARDS THE CLEAR, WELL-ESTABLISHED DISTINCTION BETWEEN BRIBERY AND COMMERCIAL BRIBERY.

Evidently because the legislative history so clearly demonstrates that the term "bribery" in the Act did not embrace 'commercial bribery," and that the terms and concepts "bribery" and "commercial bribery" are separate and distinct, the design reflected in the Opposition is simply to equate the two and thus to disregard or obfuscate the clear legal distinction between them.

a. The Opposition asserts, for example, that when the Travel Act was enacted the bribery statutes in many states were not confined to public officials and often covered commercial bribery (Opp. 8),[3] as though any particular provision in all of "the bribery statutes" equated "bribery" with "commercial bribery" without express provision therefor. The opposite is true, for it was universally recognized that the term and concept "bribery" was restricted to corruption of public officials, so that express references to private conduct or to commercial bribery were required for legislative action to be deemed to extend to such conduct.

---

[3] Fulfillment of the Opposition's design of equating the two evidently demanded an egregious misrepresentation of the Petition—that "petitioners acknowledge" this assertion (Opp. 8). In plain truth, the Petition referred to the number of states with "*commercial* bribery" statutes in the context of the traditional and accepted distinction between "commercial bribery" and "bribery", the former extending to private individuals, but the latter limited strictly to conduct involving public officials.

Two state "bribery" statutes expressly include reference to "private" persons.[4] The other statutes which had established the crime of "commercial bribery" had added a separate and distinct statutory provision, segregated from the "bribery" section, like Section 180 of the New York Penal Law involved in this case (which was enacted subsequent to the adoption of the Travel Act). Manifestly, the Government is seeking to rewrite history in blandly asserting that state criminal laws at the time of the adoption of the Travel Act equated "bribery" and "commercial bribery."

b. The same attempt to present as one legal concept what has always been analyzed as two separate concepts is reflected in the Government's employment of treatise authority. The Government's assertion that this authority regards "bribery" as including any "unauthorized exchange of money for action" without regard to whether the action is of a "public or private character" (Opp. 8) does not withstand analysis. The Government would have the Court believe, for example, that Clark & Marshall, *Crimes,* § 14.02 at 1032 (7th ed. 1967), draws a distinction between "bribery of public officers" and "bribery." *Compare* Opp. 7, n. 6 *with* Opp. 8. In plain fact, that authority declares: "At common law, and under other relevant statutes, bribery may be defined as the giving of anything of value to any *person holding a public office,* or to any person performing a *public duty*, or the acceptance thereof by any

[4] Sections 97-11-11 and 97-11-13 of the Mississippi Criminal Code covered, respectively, the giving and the receiving, involving "any officer, agent, or trustee, *either public or private,* while holding such office, agency or trust, or after he has become a candidate or applicant for the same * * *." Rhode Island General Laws Annotated §§ 11-7-3, 11-7-4 established as a misdemeanor the bribery of agents, employees or servants "*in public or private employ* * * *."

such person, with the intention that he shall be influenced thereby in the discharge of his legal duty" (Clark & Marshall, *Crimes,* 1032 (7th ed. 1967)). *Commercial bribery* is treated as a separate and distinct offense (*id.* at 1037-1038; emphasis in original).

Identically, 3 *Wharton's Criminal Law and Procedure* § 1386 (Anderson ed. 1957) (Opp. 8), in an exposition of the law which does not appear in the Opposition, declares, "Anything may serve as a bribe so long as it is of sufficient value in the eyes of the person bribed to influence his *official* conduct." The initial sentence in the overall discussion of "Bribery", which commences with § 1380 at page 771 and likewise goes unrecognized in the Opposition, reads: "Bribery is the offense of giving or receiving money or anything of value in return for which a *public officer* agrees to do or to refrain from doing an act, contrary to his legal duty." This general introduction in *Wharton's* includes this caveat: "The definition is sometimes stated so broadly as to include the violation of any 'legal duty,' as contrasted with a public or official duty. This, however, would seem to extend the definition too far, for ordinary civil duties should not be brought within the ambit of criminal prosecution" (*id.* at 773; footnote omitted).

c. In representing that *Razette* v. *United States,* 199 F.2d 44 (6th Cir.), *cert. denied,* 344 U.S. 904 (1952) holds that bribery is not restricted to official actions but includes the receiving of "anything of value with the intent to influence the recipient's actions" (Opp. 9, n. 7), the Government slips to the ploy of simply omitting from the quotation the language which truly conveys the Court's holding. What the Court held was that bribery included receiving "anything of value with the intent to influence the recipient's action *as a public*

official." Compare the Court's statement, 199 F.2d at 48 *with* the Government's, Opp. 9, n. 7. The Government's truncated reading of *Razette* is not confined to this revealing misquotation but extends to its analysis of the entire case and particularly its attempt to derogate as dictum the holding that there is a distinction between "graft" and "bribery" statutes. The very issue upon which *Razette* turned was whether the criminal statute involved, 22 U.S.C. § 1584, should be classified as a "graft" or a "bribery" statute. Manifestly, therefore, the Court's holding, as set out below, was indeed a holding and not dictum.

> "In bribery the specific intent to influence *official* action is required by the statute and must be alleged and proved. * * *
>
> "Graft means an advantage which one person by reason of his peculiar position of superiority, influence or trust exacts from another. It also includes the fraudulent obtaining of public money by the corruption of public officials. * * *
>
> "Bribery, a common law crime, is the offering, giving, receiving or soliciting anything of value with the intent to influence the recipient's action *as a public official.* It falls within a much narrower classification than that of graft." 199 F.2d at 48 (headnote indications and citations omitted).

* * * * *

In any view other than the Government's effort to maintain its untenable position in this case, there is a clear legal distinction between "bribery" and "commercial bribery." Whether United States District Judges in trials under the Travel Act may equate the two, as some have done at the same time that others have felt precluded, presents an issue which this Court should consider and decide.

IV.

THE TRAVEL ACT CANNOT BE USED TO MAKE 18 U.S.C. § 215 EXTEND TO THE CONDUCT OF THE PAYOR

Likewise, whether the Government may use the Travel Act to expand the scope of 18 U.S.C. § 215 to the payment as well as to the receipt of the specified inducement is an issue worthy of this Court's attention. The Petition analyzed the language of that statutory provision, as well as its context and purpose, in demonstrating that the decision below was evidently in error (Pet. 16-21). The Opposition assays no genuine answer to this demonstration, electing rather to engage in *ipse dixit* assertion of its own conclusion, without analysis or authority (Opp. 8-9). Patently, however, for Government prosecutors unilaterally, without any action by Congress, to apply a statute which in terms reads only against one who "receives or consents or agrees to receive" as though it reads "receives *or pays* or consents or agrees to receive *or pay*" raises an issue which merits review by this Court.

CONCLUSION

For the reasons stated herein and in the Petition, a Writ of Certiorari should issue to review the Judgment and Opinion of the Fourth Circuit.

Respectfully submitted,

ALAN Y. COLE
ISAAC N. GRONER
LEE A. SCHUTZMAN
COLE AND GRONER, P.C.
1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner